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No. 04-626

Supreme Court, U.S.
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In the Supreme Court of the United States

GLENDALE FEDERAL BANK, FSB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner was not entitled to restitution for breach of contract, because the only benefit petitioner allegedly conferred upon the government was speculative and indeterminate.

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OPINIONS BELOW

The first opinion of the court of appeals on damages (Pet. App. 22a-38a) is reported at 239 F.3d 1374. The second opinion of the court of appeals, reviewing the trial court's remand decision on damages (Pet. App. 1a-9a), is reported at 378 F.3d 1308. The trial court's first decision on damages (Pet. App. 39a-79a) is reported at 43 Fed. Cl. 390. The trial court's decision on remand (Pet. App. 10a-21a) is reported at 54 Fed. Cl. 8.

This case was previously before this Court in a consolidated appeal of three cases concerning liability. This Court's decision is reported at 518 U.S. 839. The court of appeals' previous decision concerning liability is reported at 64 F.3d 1531. The trial court's previous liability decision is reported at 26 Cl. Ct. 904.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2004. The petition for a writ of certiorari was filed on November 5, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is one of approximately 45 remaining Winstar-related cases, see *United States* v. *Winstar*, 518 U.S. 839 (1996), out of the original total of more than 120 cases that were filed. In this case, Glendale was awarded $381 million in reliance damages, and the court of appeals affirmed that award, while rejecting Glendale's claims that it was entitled to an additional $528 million in restitution.

1. As a result of high interest rates and inflation in the late 1970s and early 1980s, a number of federally insured savings and loan associations found themselves holding long-term, fixed-rate mortgages with low interest rates, while they were forced to pay high rates to attract depositors. *Winstar*, 518 U.S. at 845 (plurality opinion). One of the institutions in that situation was the First Federal Savings and Loan Association of Broward County, Florida (Broward). By 1981, Broward had liabilities that substantially exceeded its assets. Glendale, a federally insured thrift institution operating in California, submitted a proposal to the Federal Home Loan Bank Board, the thrift regulatory agency, to acquire Broward. The court of appeals explained that such "[m]ergers were attractive to solvent thrifts because they enabled the thrifts to acquire previously prohibited interstate branches, to acquire high-quality assets that suffered only from the current interest rate squeeze, and to transform an insolvent thrift's net

liabilities into an intangible asset called 'supervisory goodwill.'" Pet. App. 25a. The Board approved Glendale's proposal, and Glendale acquired Broward. *Id.* at 26a.

Federally insured thrifts had always been required to maintain minimum amounts of capital reserves, ordinarily expressed as a percentage of their assets. This Court in *Winstar* held that the transaction in which Glendale acquired Broward included a contractual undertaking by the government to permit Glendale to recognize"supervisory goodwill"—*i.e.*, the excess of Broward's liabilities over its assets—as capital for purposes of satisfying the federal capital standards, subject to amortization over a period of 40 years. *Winstar*, 518 U.S. at 861-864; see *id.* at 919 (Scalia, J., concurring in the judgment).

Faced with widespread and increasing losses in the late 1980s, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, which substantially overhauled the structure of thrift regulation. FIRREA also required thrifts to comply with strict new capital standards, which phased out over a five-year period the ability of thrifts, including Glendale, to count supervisory goodwill as capital for federal regulatory purposes. Pet. App. 26a. This Court held in *Winstar* that the government was liable to Glendale for breach of contract. 518 U.S. at 910 (plurality opinion); see *id.* at 919 (Scalia, J., concurring in the judgment). This case concerns Glendale's claims for damages for that breach.

2. Glendale was able to continue to operate, notwithstanding the breach, and, 13 years after its acquisition, it sold Broward in 1994. Pet. App. 46a. Nonetheless,

Glendale brought suit in the Court of Federal Claims, alleging that it was entitled to an award of damages as a result of the breach. At the damages trial, Glendale pursued three theories of damages: expectancy, reliance, and restitution.

a. *Expectancy.* The primary damages theory that Glendale presented at trial was an expectation theory based on a claim of lost profits. Because thrifts are required to maintain a particular amount of capital as a percentage of total assets, the amount of capital a thrift possesses establishes a ceiling on the assets it can hold. If the thrift loses capital, it must either replace it or shrink its assets. Pet. App. 27a. Glendale's expectation theory was based on its claim that it lost capital when, after FIRREA, its supervisory goodwill was phased out as capital, and it therefore shrank its assets from $25.6 billion to $14.4 billion to remain in capital compliance. Glendale asserted that it lost profits it would have earned on the increased assets. *Ibid.*

In attempting to prove its lost profits claims, Glendale officials, in sworn statements, presented at two different times two conflicting versions of what it would have done with increased assets—and therefore whether it lost profits as a result of not having those assets—in the absence of the breach. See 04-786 Cross-Pet. 4-7, 12-21. Each set of statements would have maximized Glendale's recovery on its expectation claim, in light of the circumstances extant at the time the statements were made. Presented with Glendale's irreconcilable sworn statements, the government asserted a special plea in fraud pursuant to 28 U.S.C. 2514, which provides for forfeiture of any "claim against the United States * * * by any person who corruptly practices or attempts to practice any fraud against the United States

in the proof, statement, establishment, or allowance thereof."

The trial court recognized that the two sets of statements were "not consistent" and rejected Glendale's explanations for the inconsistency, but it held that the two sets of statements "do not rise to the level of a showing of fraud," because the latter statements—which the court found to be false—were the result of "hindsight." Pet. App. 56a. On the merits of Glendale's claim for expectancy damages, the court held that Glendale's "lost profits model contains several serious infirmities, which, for reasons similar to [the inconsistencies in Glendale's testimony], make it unreliable and the lost profits too remote and speculative to be granted." *Id.* at 57a; see *id.* at 54a ("serious defects"), 57a n.3 ("infirmities" in model undercut its credibility), 13a (Glendale's model "implausible").

b. *Reliance.* In addition to its lost profits claim, Glendale asserted what it characterized as a claim for "wounded bank damages," which the trial court classified as a form of reliance damages. Pet. App. 74a. Glendale became a "wounded bank," it claimed, when it fell from capital compliance in 1992 (three years after the enactment of FIRREA) and began to incur increased costs of funds (*i.e.*, the need to pay higher rates on deposits and borrowings). *Id.* at 75a. At trial, Glendale sought those costs as damages, tracing them to the contract by attempting to show that, absent the phase-out of goodwill, it would have earned sufficient profits to maintain capital compliance and avoid the "wounded bank" costs. See *id.* at 74a.

The trial court accepted Glendale's assertion that it "would not have fallen out of [capital] compliance but for its entry into this contract and the subsequent breach,"

Pet. App. 74a, and that "the government's breach ultimately forced Glendale out of capital compliance," *id.* at 75a. The court awarded Glendale $335.4 million in "wounded bank" reliance damages. *Ibid.* In addition to the "wounded bank" reliance damages, the court awarded miscellaneous reliance damages to Glendale of $45.4 million for other increased costs alleged to have been caused by Glendale's fall from capital compliance. *Id.* at 75a-76a. The total award of reliance damages was $381 million.

c. *Restitution.* Glendale also requested recovery under a restitution theory, contending that, by purchasing Broward, Glendale had saved the Government the net liabilities of Broward and that it was entitled to recovery of that benefit conferred on the government. The trial court awarded Glendale approximately $510 million on the restitution claim. Pet. App. 76a. The court concluded that Glendale had conferred a benefit on the government of $798.2 million—the amount by which Broward's liabilities exceeded its assets at the time Glendale acquired it. *Id.* at 67a, 76a. The court then deducted from that amount $288.37 million in profits and other benefits Glendale obtained as a result of the acquisition, which included $243 million in profit Glendale realized on selling Broward in 1994. *Id.* at 76a; see *id.* at 7a. The trial court also awarded Glendale $18.24 million on a separate restitution claim. That was the amount Glendale paid the government under an "interest rate shifting" provision of the contract, which provided for payments by the government to Glendale in case interest rates rose and from Glendale to the government if interest rates fell, as they in fact did. *Id.* at 71a-72a; see *id.* at 76a.

3. The court of appeals reversed the trial court's award of restitution. Pet. App. 31a-35a. The court noted that the purpose of restitution "is to restore the non-breaching party to the position he would have been in had there never been a contract to breach," and that it is "sometimes described in terms of taking from the breaching party any benefits he received from the contract and returning them to the non-breaching party." *Id.* at 31a, 32a. But the court rejected the trial court's calculation of restitution as "the value of Broward's obligations or debts at the time the contract was made" minus the value of "Broward's then-assets." *Id.* at 32a. The court found that the trial court's restitution award was based on an award to Glendale of "supposed gains received by the [government]" that "are both speculative and indeterminate." *Id.* at 35a. See also *id.* at 3a (restitution award "basically flawed, because it was based on an assumption that the non-breaching party was entitled to the supposed gains received by the breaching party, when those gains * * * were both speculative and indeterminate"). The court based that conclusion on two major premises.

First, the court explained that Glendale's acquisition of Broward "did not result in the Government * * * saving the dollar value of the net obligations of the thrift." Pet. App. 34a. That was in part because, in the absence of the acquisition of Broward by Glendale, "it is not at all clear that * * * the Government would have been called upon to make up [Broward's] deficit then and there." *Ibid.* Indeed, one option would have been for the government to "hir[e] new and better management to run Broward and make a go of it, just as Glendale itself did." *Ibid.* What the government gained through the deal with Glendale "was time to see what

the market would do before having to commit substantial resources to the problem." *Ibid.* As the court noted, "[t]hough the value of time was more than zero, there is no proof of what in fact it was worth." *Id.* at 34a-35a.

Second, the court explained that, because the government remained the insurer of Broward's (and Glendale's) deposits, "even after Glendale's merger with Broward, the Government was not free of potential liability for the failing thrift." Pet. App. 35a. As the court stated, "[h]ad interest rates not come down, and Broward, and perhaps Glendale as well, failed, the Government's contingent liability would have matured, and the FSLIC would have had to step in at that time and assume the very losses that Glendale now claims were benefits the Government received." *Ibid.* As it turned out, "interest rates did come down, * * * and neither Glendale nor the Government was called upon to pay the potential losses." *Ibid.* In light of those various circumstances, the court was unable to uphold the trial court's restitution award, because it was "based on a speculative assessment of what might have been" if Glendale had not acquired Broward. *Ibid.* See also *id.* at 37a (restitution award based on "at most a paper calculation" that "ignores the reality of subsequent events as they impacted on the parties").

Having rejected the award of restitution as too "speculative and indeterminate" on this record, Pet. App. 37a, the court held that, "for purposes of measuring the losses sustained by Glendale as a result of the Government's breach, reliance damages provide a firmer and more rational basis than the alternative theories argued by the parties." *Ibid.* Without passing on the specific reliance damages that the trial court had

awarded, the court remanded to the trial court "for a determination of total reliance damages to which [Glendale] may be entitled." *Id.* at 38a.

4. On remand, Glendale advanced a theory of what it termed "reliance" damages that again "relie[d] on treating the assumption of Broward's liabilities as a cost, or initial investment." Pet. App. 18a. The trial court rejected that theory, noting that "much of Broward's paper deficit was eliminated by the reduction in interest rates" and that Glendale's theory had already been rejected by the Federal Circuit. *Id.* at 19a-20a. Nonetheless, after addressing other issues not of relevance to this petition, the court ultimately reinstated its earlier award of $381 million in reliance damages, on the ground that "there is nothing in the Federal Circuit's decision which requires that the court revisit its prior findings and award on the wounded bank and other post-breach reliance damages." *Id.* at 20a.

5. The court of appeals affirmed the trial court's remand judgment in its entirety, rejecting the government's contention that the $381 million damages award was erroneous and Glendale's contention that the trial court should have awarded additional reliance damages. Pet. App. 1a-9a. The court noted that "[a] large part of the problem" in this and other *Winstar* cases "has been finding a viable damages theory that fits the complex fact patterns of these cases, one that is fair to the damaged thrifts, but is based on real losses sustained so as not to overcompensate for the breach." *Id.* at 7a. The court recognized as well that "the specific documentary and evidentiary bases on which damages would be based would vary from case to case." *Id.* at 8a.

ARGUMENT

In its most recent decision, the Federal Circuit affirmed an award of $381 million in reliance damages to Glendale, based on a transaction in which Glendale continued to operate Broward for 13 years after its acquisition and three years after the enactment of FIRREA, and ultimately sold Broward at a profit. Now, contending that an award of even that amount was inadequate, Glendale contends that the court of appeals erred, in its prior decision rendered in 2001, in denying Glendale more than $500 million in restitution damages as well. That contention is without merit.

In particular, the court of appeals' holding that Glendale's restitution theory was "speculative and indeterminate" and therefore could not form the basis for a damages award was correct and does not conflict with any decision of this Court or any other court of appeals. Indeed, the court's rejection of Glendale's theory was based on the application of settled principles of the law of contracts to this case, and, contrary to Glendale's repeated assertions, the opinions nowhere give any suggestion that the court intended to—or did—apply any special damages rule because the government was a party to the contract. This Court's review of the damages issues in this case would be especially unwarranted at this late stage in the *Winstar* litigation, now that approximately two-thirds of the original cases have already reached final judgment.[1]

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[1] The government has filed a conditional cross-petition for certiorari. No. 04-786. As explained above, further review of the fact-bound question presented by this case—whether the court of appeals properly rejected Glendale's restitution claim—is unwarranted. If, however, this Court determines that the issues presented in this peti-

1. Glendale repeatedly asserts that the court of appeals' rejection of its restitution claim was based on the court's conclusion "that special pro-government rules apply" in cases like this. Pet. i. Glendale claims "that the Federal Circuit has effectively carved out a big-case exception to the rule that the government is bound by the same contract-law principles that govern all other contracting parties," Pet. 10, and that "the Federal Circuit adopted several special pro-government rules to limit artificially the government's liability." Pet. 12. See Pet. 4 ("the Federal Circuit's special pro-government rules in this case").

There is no support for Glendale's claim that the court of appeals intended to or did apply "special pro-government rules" or a "big-case exception," and there is no trace of such rules in either of the court of appeals' decisions in this case. The court of appeals rejected Glendale's claim that it was entitled to a massive restitution recovery on the ground that such a recovery would be based on "supposed gains received by [the government]," which under Glendale's proof remained "speculative and indeterminate." Pet. App. 35a. The court explained that it could not "see how the restitution award granted by the trial court, measured in terms of a liability that never came to pass, and based on a speculative assessment of what might have been, can be upheld." *Ibid.* Those conclusions have nothing to do with the identity of the parties, the size of the case, or

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tion are sufficiently important to warrant its review, the Court should consider not just Glendale's challenges to the recovery in this case, but also the challenges set forth in the government's cross-petition as well, so that the Court could consider all issues relevant to the proper calculation of damages.

the fact that the government was the defendant. To the contrary, Glendale presented a "restitution theory [that] was basically flawed," and the court correctly rejected it for that reason. *Id.* at 3a. The Federal Circuit, or any other court, properly should reject a similarly "flawed," "speculative," and "indeterminate" claim advanced by any party in any contract litigation.

In short, there is no basis in the court of appeals' actual decisions in this case for Glendale's claim that the court adopted a special pro-government rule or otherwise departed from standard principles of contract damages in rejecting Glendale's restitution claim. Indeed, a court intent on adopting a special rule limiting recoveries against the government would not have affirmed a huge award of $381 million in damages to Glendale which, as the government's cross-petition demonstrates, was unwarranted and unjustified.

2. Far from adopting a "special pro-government rule," the court of appeals correctly held that Glendale had simply failed to make a satisfactory showing that it was entitled to the restitution recovery it claimed. As the court of appeals correctly recognized, the idea behind restitution is "to restore the non-breaching party to the position he would have been in had there never been a contract to breach." Pet. App. 31a. The court further noted that, in order to restore the non-breaching party to its pre-contract status, it is necessary to identify "what benefit from the contract the breaching party has received, and restor[e] that to the non-breaching party." *Id.* at 32a.

Glendale does not dispute those principles. The question in this case, then, is simply whether Glendale's theory adequately identified and quantified the benefit it, as the non-breaching party, conferred on the breach-

ing party, *i.e.*, the government. Glendale's theory was that, prior to Glendale's merger with Broward, the government, as insurer of Broward's deposits, possessed a potential liability equal to Broward's net liabilities. Glendale relies upon the trial court's original holding that, when Glendale merged with Broward, it relieved the government of this potential liability and that, therefore, the value of the "benefit" Glendale conferred upon the government was equal to Broward's net liabilities of $798.291 million. Pet. App. 71a. Under that theory, the value of Glendale's assumption of Broward's liabilities was precisely equal to a payment to the government of $798.291 million in cash.

a. The court of appeals rejected Glendale's theory because Glendale's assumption of the net liabilities, on paper, of Broward at the time it was acquired "did not result in the Government * * * saving the dollar value of the net obligations of the thrift." Pet. App. 34a. Glendale's claim for restitution depended on the proposition that its assumption of Broward's net liabilities was equivalent to a transaction in which Glendale purchased an asset from the government for $798.291 million in cash, which the government was then able to use as it wished. As the court of appeals held, however, Glendale's purchase of Broward was worth far less than $798.291 million in cash.

First, Glendale's assumption of Broward's liabilities was not equivalent to a dollar-for-dollar gain for the government, because it was "not at all clear that * * * the Government would have been called upon to make up that deficit then and there." Pet. App. 34a. The government could have found other acquirers for Broward, or it could have done just what Glendale did and "hir[ed] new and better management to run Broward and make

a go of it." *Ibid.* In either event, the government would not have liquidated Broward, and Glendale's acquisition of Broward therefore did not save the government the $798.291 million it would have had to pay out to Broward's depositors in such a liquidation.[2]

Second, Glendale's theory that the government's benefit equaled Broward's net liabilities depended on the proposition that, when Glendale acquired Broward, the government was finally relieved of any obligation to pay for those liabilities. As the court of appeals recognized, however, that was not true. Even after Glendale acquired Broward, the government remained contingently liable, as insurer of Glendale's deposits, for all of Broward's net liabilities. As the court of appeals explained, "[h]ad interest rates not come down," both Broward and Glendale could have failed, "and the FSLIC would have had to step in * * * and assume the very losses that Glendale now claims were benefits the Government received." Pet. App. 35a. Indeed, under Glendale's theory, the government would have had to pay *twice* for Broward's net liabilities if interest rates remained high and Glendale had failed—once in restitution damages to Glendale (since the government would have received the $798.291 benefit at the time the acquisition was completed) and a second time when it

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[2] Indeed, neither court below held that Glendale ever was required to pay Broward's $798.291 million net liabilities. See Pet. App. 18a (trial court: "[P]laintiff has failed to persuade the court that its reliance damage model shows any actual losses sustained by plaintiff as a result of the Government's breach.") (internal quotation marks omitted); *id.* at 35a (court of appeals: Glendale's theory based on "a liability that never came to pass"). Thus, Glendale did not confer a benefit upon the government by paying Broward's net liabilities.

had to pay off Broward's depositors when the institution ultimately failed.

The court of appeals concluded that, although Glendale's restitution theory was "flawed," the government did receive some benefit for Glendale's acquisition of Broward. Pet. App. 34a. That benefit, however, was not a dollar-for-dollar gain in the amount of Broward's net liabilities, but rather "time to deal with other failing S & Ls [and] time to see what the market would do before having to commit substantial resources to the problem." *Ibid.* Because Glendale offered "no proof of what in fact [that period of time] was worth" to the government, however, Glendale was unable to recover on a restitution theory based on that benefit. *Id.* at 35a.

b. Glendale contends (Pet. 18) that the court of appeals erred because some evidence indicated that the government had no alternative to the merger and that, in the absence of the merger, the government would have paid Broward's net liabilities. Neither court below, however, held that, in the absence of the merger, the government would have paid Broward's net liabilities. Indeed, the court of appeals' analysis of the record made quite clear that the government would have turned to another acquirer or would have made some other arrangement. See Pet. App. 34a; cf. 99-5103 C.A. App. A1014811-13 (testimony about alternatives); A1008201 (testimony of Glendale expert that "I'm not suggesting that the government would have liquidated Broward").[3] In any event, further review would not be warranted to consider whether the court of appeals correctly

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[3] Citations to 99-5103 C.A. App. are to the Joint Appendix in Nos. 99-5103 and 99-5113, the first damages appeal, which was decided in the opinion reproduced at Pet. App. 22a-38a.

apprehended the record evidence in this particular case.

Glendale also contends (Pet. 18) that, at the time of the acquisition, there was no "material risk" that the combined thrift would fail even if interest rates did not decline. Again, neither court below held that there was no material risk that the merged thrift would fail. Indeed, there was a substantial basis for the conclusion that continued high rates would jeopardize Glendale with or without the acquisition of Broward. See, *e.g.*, 99-5103 C.A. App. A1017496-520 (expert testimony on Glendale's financial condition), A2000422 (Glendale's negative interest-rate spread at time of acquisition), A3000202 (similar), A3000419-21 (similar). And if there was *any* risk that the post-acquisition Glendale would fail, the value to the government of Glendale's acquisition of Broward was equal, at most, to Broward's net liabilities discounted by the risk that the merged thrift would fail and the government would be required after all to pay those liabilities. Because Glendale made no attempt to establish even that value, it could not form the basis for a restitution award. In any event, further review would not be warranted to determine the case-specific question whether the court of appeals accurately assessed the evidence in this case regarding whether Glendale could have failed had interest rates not declined as they did.

3. Glendale errs in contending that the court of appeals adopted three mistaken legal rules in rejecting its restitution theory.

a. Glendale asserts (Pet. 13) that the court of appeals "held that any restitution award that exceeded Glendale's 'actual losses' was flatly unavailable." See Pet. i. No such holding can be found in the court of

appeals' opinion. To the contrary, the court of appeals correctly recognized that restitution "requires determining what benefit from the contract the breaching party has received, and restoring that to the nonbreaching party." Pet. App. 32a. The court of appeals rejected Glendale's theory not because a restitution award would exceed Glendale's "actual losses," but because Glendale's attempt to prove a benefit received by the government was "flawed," "speculative," and "indeterminate." *Id.* at 34a, 35a.[4]

b. Glendale also complains (Pet. 16) of what it terms the "Federal Circuit's * * * declaration that, as a matter of law, restitution is simply unavailable against

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[4] Although the profits or losses involved in Glendale's performance of the contract would not limit a restitution recovery, see *Mobil Oil Exploration & Producing S.E., Inc.* v. *United States*, 530 U.S. 604, 623-624 (2000), the cost to Glendale of providing a benefit to the government would provide such a limit. Requiring a breaching party to restore benefits conferred by the non-breaching party, even when those benefits exceed the sums needed to restore the non-breaching party to its *status quo ante*, is a form of disgorgement, not restitution; while restitution aims to restore the non-breaching party to the position it would have occupied had there been no contract, disgorgement may place the non-breaching party in a *better* position than it would have occupied in the absence of the contract. The remedy of disgorgement is ordinarily confined to circumstances in which a defendant has consciously made wrongful use of another's property, such as embezzlement, conversion, and copyright infringement. Disgorgement has never been accepted as a remedy for ordinary breach of contract. *Burger King Corp.* v. *Mason*, 710 F.2d 1480, 1494 (11th Cir. 1983), cert. denied, 465 U.S. 1102 (1984); Restatement (Second) of Contracts § 371, illus. 2 (1981); 3 Dan B. Dobbs, *Law of Remedies* § 12.7(3), at 799 (2d ed. 1993); *id.* § 12.7(4), at 171; see Andrew Kull, *Disgorgement for Breach, the "Restitution Interest," and the Restatement of Contracts*, 79 Tex. L. Rev. 2021, 2021-2027, 2043-2044 (2001); E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of a Disgorgement Principle in Breach of Contract*, 94 Yale L.J. 1339 (1985).

the government when the plaintiff's performance is the assumption of liabilities." See Pet. i. No such "declaration" by the court of appeals can be found in either of the court's decisions in this case. The court of appeals merely concluded that the facts of this case involved a particular type of liability that remained in part with the government (as ultimate insurer) even after Glendale "assumed" it, and that never had to be paid in any event. Because Glendale did not prove the value of its "assumption" of that particular kind of "liability," the court of appeals held that Glendale could not recover restitution for that value. The court did not reach any general conclusion that restitution is not available for the assumption of liabilities.

c. Finally, Glendale also errs in its claim (Pet. 19) that the court of appeals "concluded that, as a matter of law, calculation of any benefit to the government is not measured at the time the benefit was conferred, but instead must take account of subsequent events." See Pet. i. Once again, that is not what the court of appeals held. The court's holding, instead, was precisely the principle that Glendale supports: that for the calculation of a restitution award, "the critical event that fixes the damages is *when the contract was entered into.*" Pet. App. 37a (emphasis added).

To be sure, the court did discuss some events that occurred after the formation of the contract. The question before the court was whether Glendale's restitution theory, which depended on the proposition that Glendale's assumption of $798.291 million in Broward liabilities had a value to the government equivalent to $798.291 million in cash, was correct. As one of several bases for rejecting Glendale's theory, the court mentioned the subsequent events that "interest rates did

come down" and that "neither Glendale nor the Government was called upon to pay the potential losses." Pet. App. 35a; see also *id.* at 37a (Glendale's theory was based on "at most a paper calculation" that "ignores the reality of subsequent events."). Those subsequent events, like other factors in this case, demonstrated that Glendale's assumption of Broward's liabilities did *not* result in a benefit that was anywhere near the value of a cash payment of $798.291 million to the government. Thus, to the extent that the Federal Circuit looked at potential events that occurred after the time of contract formation, it did so not because those events subsequently reduced the original value of the benefit that petitioner had conferred on the government, but rather because the possibility that those events would occur showed that petitioner did not confer the benefit it claimed—the equivalent of a $798.291 million cash payment.

4. Essentially for the reasons given above, Glendale errs in contending (Pet. 13, 19-20) that the decision below conflicts with this Court's decision in *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U.S. 604 (2000). In *Mobil Oil*, the nonbreaching parties (the oil companies) "paid the government $156 million in up-front cash 'bonus' payments," *id.* at 611, in return for the government's agreement to certain lease contracts. They sought restitution of that amount when the government repudiated the contracts. This Court held, *inter alia*, that "[b]ecause the Government repudiated the lease contracts [at issue in *Mobil Oil*], the law entitles the companies to * * * restitution whether the contracts would, or would not, ultimately have produced a financial gain" for the nonbreaching party. *Id.* at 623-624. In short, a recovery in

restitution does not depend upon the non-breaching party's proof that the contract would ultimately have proven profitable.

Here, in accord with *Mobil Oil*, the court of appeals did not examine subsequent events to determine whether petitioner had been injured by the breach. Instead, the court relied primarily upon events at the time of the transaction and the nature of the transaction itself to hold that Glendale had failed to show the amount of the benefit, if any, that it conferred on the government. Because that benefit did not involve a cash payment, as in *Mobil Oil*, its value in dollars had to be proven by Glendale. It was with respect to the issue of that value—an issue that did not arise in Mobil Oil—that Glendale failed to make the necessary showing. The court of appeals held that the value of the benefit Glendale claimed it conferred—a benefit equivalent to $798.291 million in cash—had to be rejected because it was "based on a speculative assessment of what might have been" if Glendale had not acquired Broward and the government therefore had been forced to pursue other options. Pet. App. 35a. That holding is entirely consistent with the holding and reasoning of *Mobil Oil*.[5]

5. Petitioner contends (Pet. 3, 15-16) that the court of appeals' refusal to award it $18.24 million it paid under an insurance provision in the contract was erroneous and a sign of "the court's distaste for restitution." The $18.24 million payment resulted from a provision in the contract that petitioner desired. The provision recognized that interest rates might continue to increase before declining, and it therefore provided

[5] Moreover, unlike the companies in *Mobil Oil*, petitioner continued to perform after FIRREA and, thus, even if a material breach did occur, petitioner waived it. See *Mobil Oil*, 530 U.S. at 622.

for the government to pay petitioner if rates increased or, alternatively, for petitioner to pay the government a maximum of $18 million if rates decreased, as they did. PX 7L at 2 (minutes of Glendale Board meeting). Petitioner regarded the provision as "purchase[d] insurance" from FSLIC to protect against the possibility of a rise in interest rates, PX7L at 1, and it was originally described as "support" that FSLIC would supply to petitioner, not a cost to petitioner. See *id.* at 1-2. Petitioner received the insurance protection it desired and for which it had contracted. Tr. 17534-37; DX 3085. Accordingly, because the interest rate protection provision of the contract was fully performed by each party, restitution is not available. Restatement (Second) of Contracts, *supra*, § 373 cmt. c.[6]

6. Glendale claims that the court of appeals' restitution holding conflicts with the Ninth Circuit's decision in *Far West Federal Bank* v. *Office of Thrift Supervision*, 119 F.3d 1358 (1997), and the Tenth Circuit's decision in *Resolution Trust Corp.* v. *FSLIC*, 25 F.3d 1493, 1497, reh'g denied, 34 F.3d 982 (1994). Even if a conflict existed, its practical significance would be limited, at best, because no *Winstar*-related cases are now being litigated outside of the Federal Circuit. In any event, there is no conflict, because *Far West* and

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[6] In any event, even if the Court concluded that Glendale was entitled to the $18.24 million in restitution it claims, that amount would be more than offset by the $243 million in benefits that Glendale itself received from the contract. See generally 04-786 Cross-Pet. 25-29. Indeed, Glendale itself conceded that the $243 million in benefits it received should be offset against its claimed $798.291 million restitution award, see Pet. App. 48a, and there is no reason that it would not be available as an offset against the claim for $18.24 million in restitution as well.

RTC involved claims for restitution that are fundamentally different from Glendale's claim in this case.

In *Far West* and *RTC*, the plaintiffs were outside investors who infused cash into acquired thrifts, which were subsequently seized by the government upon the enactment of FIRREA. The courts reasoned that, in the circumstances of those cases, the plaintiffs' capital infusions conferred a corresponding benefit upon the government by giving the thrifts more assets and capital than they otherwise would have possessed. See *Far West*, 119 F.3d at 1366 ("By investing $26.6 million in Far West, the Investors at the very least bore some of the government's risk of loss in the event of Far West's failure."); *RTC*, 25 F.3d at 1505 (restitution award justified by "the undisputed fact that the Investors had infused $6 million" into the thrift). As restitution, the courts awarded the investors an amount equal to the new capital they had infused into the thrift.

Contrary to Glendale's suggestion (Pet. 20), *Far West* does not hold that the existence of regulatory alternatives to liquidation "is legally irrelevant to the availability and amount of restitution." Instead, the Ninth Circuit in *Far West* merely held that the trial court did not abuse its discretion in awarding restitution based upon the amount of cash infused by the outside investors into the thrift. The government's regulatory alternatives were immaterial in the particular circumstances of that case, because "the Investors do not have to prove that their investment [of $26.6 million in cash] *actually* prevented the ultimate failure of Far West in order to recover restitution." 119 F.3d at 1366. Glendale too did not have to prove that its acquisition of Broward ultimately prevented the failure of that institution in order to recover restitution. But Glendale

did have to prove the value of the benefit, if any, that it conferred on the government in order to recover restitution. The fact that the Ninth Circuit in *Far West* found little difficulty in determining the value of the $26.6 million in cash that the plaintiffs in that case invested in the thrift does not cast any doubt on the Federal Circuit's ruling in this case that Glendale had failed to prove the value of the benefit, if any, that it conferred on the government when it acquired Broward without putting *any* cash into the institution.

Petitioner's reliance upon *RTC* is likewise mistaken. *RTC* held that the plaintiffs' right to recover their capital infusion was not affected by the fact that the government ultimately was required to liquidate the thrift after the enactment of FIRREA. 34 F.3d at 984. The court relied upon the rule that a conferred benefit may be recovered even if it "was or may have been 'later lost, destroyed, or squandered.'" *Ibid.* (quoting Restatement (Second) of Contracts, *supra*, § 370, cmt. a). As explained above, the Federal Circuit's decision in this case comports with that rule; the Federal Circuit rejected petitioner's claim for restitution not because the benefit that petitioner claimed to have conferred was "later lost, destroyed, or squandered," but because it was never conferred—or, at least, Glendale never proved that it was conferred—in the first place.[7]

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[7] Indeed, the Federal Circuit cited *Far West* with approval when that court was presented with a *Winstar*-related case analogous to *Far West* and *RTC*. Where investors infused real assets into a thrift that was seized subsequent to FIRREA, the Federal Circuit approved precisely the same remedy as its sister circuits, *Landmark Land Co.* v. *United States*, 256 F.3d 1365 (2001), and permitted full restitution of the amount of capital infused.

7. Finally, the court of appeals' refusal to grant Glendale the restitution recovery it sought is justified on the alternative ground that 28 U.S.C. 2514, which provides that "[a] claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof," precludes all of Glendale's claims in this case. Section 2514 requires the forfeiture of the entire claim, including those portions which would have been awarded absent the fraud, if "any fraud is practiced or attempted to be practiced in proving, establishing or allowing a claim." *Kamen Soap Prod. Co.* v. *United States*, 124 F. Supp. 608, 620 (Ct. Cl. 1954); see 04-786 Cross-Pet. 12-13 (citing cases).

As explained in greater detail in the government's cross-petition in this case (at 12-21), Glendale officials at the highest corporate levels, in sworn statements, submitted to the courts two wholly incompatible factual versions of their business intentions after the merger with Broward. The common thread between the two inconsistent sets of statements is that each set would have maximized recovery at the time it was made. The court below erred in rejecting the government's special plea in fraud asserted under Section 2514. Had it correctly ruled on the government's assertion of Section 2514, Glendale would have forfeited its restitution claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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